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No. 83-1960

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
AND PACIFIC MARITIME ASSOCIATION,
Petitioners,

VS.

UNITED STATES OF AMERICA, FEDERAL MARITIME
COMMISSION, CALIFORNIA CARTAGE COMPANY, INC.,
CONTAINERFREIGHT TERMINALS COMPANY, AND
HAWAIIAN PACIFIC FREIGHT FORWARDING,
Respondents.

SUPPLEMENTAL BRIEF ON PENDING PETITION FOR CERTIORARI PURSUANT TO U.S. SUPREME COURT RULE 22.6

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Come now Petitioners and pursuant to U.S. Sup. Ct. Rule 22.6, 28 U.S.C. hereby file this supplemental brief to call the Court's attention to its decision in *John R. Block, Secretary of Agriculture, et al., petitioners v. Community Nutrition Institute, et al.*, No. 83-458, ... U.S. ....., 52 U.S. Law Week 4697 decided on June 4, 1984, after the petition herein had been filed.

1. In the petition it was argued that because the Maritime Labor Agreements Act of 1980, 94 Stat. 1021 (codified at 46 U.S.C. §§ 801, 814 and 841c) ("MLAA") expressly gives a cause of action to "carriers, shippers or ports" to attack assessment agreements as discriminatory or detrimental to commerce, it precludes such an attack by others. (Ptn. 16-19; 28-29).

In *Block* this Court adopted this precise analysis. The statute therein involved (the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq.) ("the Act") provided for review of market milk orders only by dairy producers and milk handlers. It did not provide for participation by consumers in the review process.

> [T]he omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process. ..... U.S. at .....; 52 U.S. Law Week at 4698.

While

> [t]he general purpose sections of the Act allude to general consumer interests [,] . . . the preclusion issue turns ultimately on whether Congress intended for *that class* to be relied upon to challenge agency disregard of law . . . . The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objective would be realized. ..... U.S. at .....; 52 U.S. Law Week at 4698-4699 (emphasis supplied).

So here, the structure of MLAA indicates that Congress intended only carriers, shippers or ports, and no others, to ensure that the statutory objectives would be realized.

2. The Court of Appeals for the District of Columbia Circuit, whose judgment was reversed in *Block*, had noted that there was "no legislative history or statutory language [which] directly and specifically supported the preclusion of consumer suits". ..... U.S. at .....; 52 U.S. Law Week at 4699. This is precisely the approach the Ninth Circuit took in granting standing to respondent companies in the instant case. (Ptn. 26-29).

This Court, however, held that the presumption favoring judicial review "may be overcome by inferences of intent drawn from the statutory scheme as a whole".

> In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues *at the behest of particular persons*, judicial review of those issues *at the behest of other persons* may be found to be impliedly precluded. ..... U.S. at .....; 52 U.S. Law Week at 4699 (emphasis supplied).

This Court thus rejected the view of the Court of Appeals that to preclude review there had to be "unambiguous proof" of congressional intent to that effect. Rather, it found such congressional intent to be "fairly discernible" in the detail of the legislative scheme.

> Congress simply did not intend for consumers to be relied upon to challenge agency disregard of the law. ..... U.S. at .....; 52 U.S. Law Week at 4700.

By a parity of reasoning, Congress simply did not intend in MLAA for competitors outside the bargaining unit which are neither carriers, shippers nor ports to be relied upon

to challenge an assessment agreement as detrimental to commerce.

3. Finally, this Court observed that preclusion of consumer suits will not threaten the objectives of the statute since there is a class who can be expected to challenge unlawful agency action. ..... U.S. at .....; 52 U.S. Law Week at 4700. So here, there is a class who can be expected to challenge assessment agreements if they are detrimental to commerce—as indeed the Port Authority of New York and New Jersey has already done. (Ptn. p. 11-12, n.11).

This Court's decision in *Block* is an additional authority for the granting of the writ.[1]

San Francisco, California
June 15, 1984

Respectfully submitted,

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[1]Subsequent to the filing of the petition herein, West Publishing Company reported the decision of the Court of Appeals for the Eleventh Circuit holding that the Service Contract Act of 1965, 41 U.S.C. 351-353 ("SCA") did not authorize a private action despite plaintiffs contention "that there is nothing in the legislative history of SCA that indicates that Congress meant to exclude private actions. . .". *District Lodge No. 166 v. TWA Services*, 731 F.2d 711, 714 (11 Cir., 1984). Compare Ptn. 26-29.